The *Hohenberg* case, as the facts are stated by our correspondent, presented in substance the same question. One plaintiff, it is true, was a resident of the district in which the case was pending in the state court; but it is settled that to give jurisdiction in the district of the plaintiff's residence under section 51 of the Judicial Code (or the corresponding provisions of earlier acts) *all* the plaintiffs must be residents of the district.[23] So far as removal was concerned, therefore, the case was the same as if both plaintiffs, instead of only one, had been residents of a different district of Alabama from that in which the suit was brought. The case would furnish weightier support to Judge Cochran's views if it had faced the issue with equal frankness. Our correspondent, who approves the decision, informs us that it was thrice argued, and that *Ex parte Wisner* was much relied on by the plaintiffs; but the opinion cites neither that case, nor Judge Cochran's decision, nor any other authorities. Under these circumstances, it rather adds to than helps to clear up the uncertainty in which the law now stands.

JUDGMENTS BASED ON PRESUMPTION OF DEATH AS AFFECTING AN ABSENTEE'S RIGHTS

To determine the effectiveness of a judgment based upon the presumption of death arising from several years' absence[1] to protect a person who acts in reliance upon the judgment against claims of the

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removal of such suits, is obviously to give either party the option of having a federal question decided in the first instance by a federal court. This option on the part of the plaintiff can in no way be defeated by the defendant. The defendant's right should be equally assured. But the result of the above decisions is to permit the defendant to remove only in the cases where he presumably cares least about doing so, namely, where he is sued in his own state court; to leave the choice between state and federal courts for the trial of a federal question wholly in the hands of the plaintiff, provided only that he can secure service on the defendant in some state where the latter does not reside; and to make the right of removal depend on an accidental circumstance which, in this class of cases, has nothing whatever to do with the real reason for allowing removal at all.

[23] *Smith v. Lyon* (1890) 133 U. S. 315, 10 Sup. Ct. 303; *Turk v. Illinois Cent. R. R. Co.* (1914, C. C. A. 6th) 218 Fed. 315.

[1] It is held almost universally that a rebuttable presumption of death arises when a person has been absent from his last or usual place of residence and no tidings of him have been received for a considerable period of time. Usually the necessary period of absence is established as seven years. The beginning of this seven year presumption as a common law rule applicable in all questions of life and death is found in *Doe v. Jesson* (1805, K. B.) 6 East 80. For the origin and history of the presumption, see James Bradley Thayer, *Presumptions and the Law of Evidence* (1889) 3 HARV. L. REV. 151-154. The rule is sometimes modified by statute. See 2 Chamberlayne, *Evid.* sec. 1097 *et seq.*

supposedly dead absentee, in case he afterwards reappears, discrimination is required between three classes of cases.

(1) The actual death of the absentee may be a jurisdictional fact—as in probate proceedings on the estate of a decedent. In such cases a judgment based upon the seven year presumption of death is utterly void, if in fact the absentee was alive. It confers no power to alter legal relations; it cannot change the rights or immunities of the absentee, nor afford protection to anyone making payment in reliance upon it. Hence payment by a debtor of the supposed decedent to the person appointed administrator of his estate is no defense to a subsequent suit by the creditor himself; nor will a court decree protect the innocent purchaser of his property at judicial sale.[2] Nevertheless, in the exercise of its police power over property within its boundaries, a state may provide by statute for the distribution of the estate of absentees, for in this event absence for the required period, not death, is the jurisdictional fact.[3]

(2) If death is not a jurisdictional fact, and if the proceeding in which the judgment is rendered is a proceeding *in rem,* the judgment will protect one acting in reliance upon it against the claims of the absentee erroneously supposed to be dead. A typical instance of cases falling within this second class may be found in a decree of distribution entered in the administration of a decedent's estate. The administrator who makes payment in accordance with the decree is privileged so to distribute the property even though an heir of the decedent was erroneously omitted from the distribution. Such a decree, though based on an erroneous finding of the death of an absent heir, is effective, until set aside, to change legal relations in respect to the *res,* because the court had jurisdiction of the subject

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[2] *Jochumsen v. Suffolk Savings Bank* (1861, Mass.) 3 Allen 87; *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108.

[3] Such statutes do not violate the Fourteenth Amendment to the Constitution if the requisite period of absence is not unreasonably short, if adequate notice by publication is given to the absentee, and if reasonable safeguards are provided for the protection of the absentee's rights in case he returns. *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 25 Sup. Ct. 721; *New York Life Ins. Co. v. Chittenden* (1907) 134 Iowa 613, 112 N. W. 96; *cf. Lavin v. Emigrant Savings Bank* (1880, C. C., S. D. N. Y.) 1 Fed. 641; and see *Nelson v. Blinn* (1908) 197 Mass. 279, 83 N. E. 889. The last case sustains the Massachusetts statute as a statute of limitations.

Under such statutes administration of the property of absentees falls within the second class of cases mentioned in the text.

Statutes of a similar nature are those relating to abandoned bank deposits. See *Provident Institution, etc. v. Malone* (1911) 221 U. S. 660, 31 Sup. Ct. 661; *Commonwealth v. Dollar Savings Bank* (1917, Pa.) 102 Atl. 569.

[4] *Loring v. Steineman* (1840, Mass.) 1 Metc. 204; *Cleaveland v. Draper* (1907) 194 Mass. 118, 80 N. E. 227; *Jones v. Jones* (1916) 223 Mass. 540, 112 N. E. 224; *cf. Ernst v. Freeman's Estate* (1902) 129 Mich. 271, 88 N. W. 636, and *In re Price's Estate* (1917, Minn.) 162 N. W. 454.

matter and notice by publication satisfies the requirements of due process in respect to all parties interested.[5]

(3) The third class of cases is composed of those where death is not a jurisdictional fact, and the proceeding is not *in rem* but *in personam*. A judgment rendered in such a proceeding is entirely inoperative with respect to the rights of any claimant not before the court.[6] The danger that a defendant, after being held liable to claimant B. on the theory that claimant A. is dead, may also have to pay A., should A. later appear, is unavoidable unless the defendant by some statutory form of interpleader is permitted to change the proceeding from one purely *in personam* to one *quasi in rem*.[7]

The necessity of discriminating between the above mentioned classes of cases is illustrated by a decision of the Supreme Court of Pennsylvania. *Maley v. Pennsylvania R. R. Co.* (1917, Pa.) 101 Atl. 911. The defendant railroad was the depositary of an employee's savings fund payable upon the death of the depositor to his sons, or, if they were not living, to his legal representatives. The executrix of a deceased depositor demanded payment of such a fund, the sons of the depositor having been absent and unheard of for some eighteen years. The trial court left to the jury the question whether the sons were dead,[8] and on a verdict for the plaintiff the court entered judgment. The defendant appealed on the ground that the judgment would not protect it from having to pay again to the sons, should they subsequently appear. The judgment was affirmed, with a *dictum* that it would fully protect the defendant against any future claim by the sons.

The case appears to fall within the third group of the classification above mentioned. Clearly it is not in the first class. The sons had left home prior to 1898, while their father, the depositor, did not die until 1913. According to the presumption, therefore, they

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[5] "Wherever the court has jurisdiction as to the subject and parties, its judgment must be conclusive on all parties and privies notwithstanding any error of fact or of law, until it be reversed, or be vacated for fraud." Per Wardlaw, Ch., in *Hurt v. Hurt* (1853, S. C.) 6 Rich. Eq. 114, 120; see also *Mooney v. Hinds* (1894) 160 Mass. 469, 36 N. E. 484.

[6] *Kelly v. Norwich Fire Ins. Co.* (1891) 82 Iowa 137, 47 N. W. 986; *Mahr v. Norwich, etc., Soc.* (1891) 127 N. Y. 452, 28 N. E. 391; *Pennoyer v. Neff* (1877) 95 U. S. 714.

[7] *Cf. Perry v. Young* (1916) 133 Tenn. 527, 182 S. W. 577; and see (1917) 27 YALE LAW JOURNAL, 252.

[8] It is not apparent why the question of the sons' death was left to the jury. The fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of explanatory facts to the contrary. See 4 Wigmore, *Evid.* sec. 2490; 2 Chamberlayne, *Evid.* sec. 1090. But even if the trial court did not charge the jury with precise accuracy as to the effect of the presumption of death, the error was not prejudicial to the defendant.

predeceased their father. The plaintiff's claim to the fund was not derived through the sons, but was based upon the defendant's agreement to pay the depositor's legal representatives, *if* he outlived his sons. Hence the suit against the depositary was in no sense a proceeding to distribute the estate of the sons. Neither does the case fall within the second group. It was not a proceeding *in rem* to distribute a fund admittedly forming part of the depositor's estate.[9] It was simply a suit on a contract to recover money payable to the plaintiff if a certain contingency had happened, or payable to the sons if it had not happened. No attempt appears to have been made to give notice by publication or otherwise to the absent sons. It cannot therefore be considered as a valid proceeding *in rem* to cut off their claims.[10] The suit was simply a proceeding *in personam* to recover money alleged to be owing to the plaintiff as executrix of the depositor.[11]

It is respectfully submitted, therefore, that while the affirmation of the judgment for the plaintiff was correct, the *dictum* that payment thereunder would protect the defendant against the sons' demand, should they reappear, was unsound.[12] There is nothing unusual in subjecting a defendant to the danger of having to pay twice. The possibility always exists that a judgment in a suit *in personam* may be based on an error of fact and that the true claimant may also obtain a judgment against the defendant. Suppose, for example, that A. gets judgment against B. for converting a certain horse alleged by A. to be his. In truth the horse may have belonged to C. and therefore C. may also get a judgment against B. for the very same act of conversion already held tortious as to A. The fact that in the first suit the horse was decided to be A.'s, and that B. has already paid the judgment in A.'s favor, will furnish no protection to B. if C. can establish that the horse was really his.[13]

DECREES AFFECTING FOREIGN PROPERTY

When a court sitting in one state is called upon to render a judg-

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[9] *Jones v. Jones, supra,* note 4, was such a suit and is therefore distinguishable from the case under discussion.

[10] *Cf. Perry v. Young, supra,* note 7.

[11] The happening of the condition on which the money was payable to the plaintiff, namely, the death of the sons, was one of the operative facts creating the defendant's duty to pay, which the plaintiff was obliged to prove. Having proved it—by virtue of the presumption of death—she was entitled to judgment.

[12] It is believed that a decision in accordance with this *dictum* would be unconstitutional as depriving the absentee of his property without due process. See (1917) 27 YALE LAW JOURNAL, 121.

[13] The principle is too elementary to require the citation of authorities. On the general subject of the non-conclusiveness of judgments as against strangers to the proceedings, see Black, *Judgments,* sec. 600; 23 Cyc. 1237.